IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO.641 OF 2004
IN
NOTICE OF MOTION NO.1940 OF 2004
IN
SUMMONS FOR JUDGMENT NO.258 OF 2000
IN
SUMMARY SUIT NO.4585 OF 1999

M/s.Asian Engg.Sales Corpn. ....Appellant

V/s.

Bank of Baroda ....Respondent

Mr.K.R. Belosey for the Appellant.

Mr.M.P. Rege for the Respondent.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 16TH MARCH, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. This is an Appeal against the order of the learned single Judge dismissing the Appellant's above Notice of Motion. By the Notice of Motion, the Appellant sought to have an ex-parte order passed on 7th June, 2004 set-aside and for the Summons for Judgment to be restored and heard on merits.

2. The order dated 7th June, 2004 was passed on

the Summons for Judgment taken out by the Respondent in the above suit. The learned Judge recorded the fact that neither the Appellant nor his advocate remained present when the matter was called out in the morning and afternoon sessions ; that prior thereto an ex-parte decree had been passed on 30th April, 2002 as the Appellant had failed to contest the matter ; that the Appellant made an application for setting aside the decree in which by an order dated 4th June, 2002, an ex-parte decree was stayed conditional upon the Appellant depositing in the Court 50% of the decretal amount within eight weeks i.e. on or before 4th June, 2002. The Appellant challenged the said order by filing an Appeal being No.702 of 2002. By an order dated 13th August, 2002, the Appeal Court merely extended the time to deposit the said amount. Thereafter as recorded in the order, the ex-parte judgment and decree was stayed on the same terms. By an order dated 13th April, 2004 the Court disposed of the application by restoring the Summons for Judgment in view of the Appellant having deposited 50% of the decretal amount. By the order dated 7th June, 2004, the learned Judge hearing Summons for Judgement, granted to the Appellant leave to defend conditional upon their depositing the balance 50% of the decretal amount within four weeks. The Appellant has not

complied with the said condition.

3. By the impugned order the learned Judge observed that there was no real defence to the claim in suit. The learned Judge refused to set-aside the order but gave the Appellant eight weeks time to deposit the remaining 50% of the decretal amount as per order dated 7th June, 2004.

4. The impugned order warrants no interference. It is apparent that the Appellant has been avoiding appearing before the Court for no justifiable reason. Even on merits, the Appellant has no defence. The Appellant is the acceptor of the bill of exchange. The Respondent/Plaintiff is a payee in respect of the bill of exchange. The only defence is that the goods supplied by the drawer in consideration whereof the Appellant/Defendant accepted the bills of exchange were defective. The Respondent as a payee is not concerned with any alleged dispute that there may be between the Appellant and the drawer of the bills of exchange.

5. Mr.Belosey, the learned counsel appearing on behalf of the Appellant relied upon a judgment of the Supreme Court in the case of *M/s.Sunil Enterprises v.*

SBI Commercial & International Bank Ltd., A.I.R. 1998 S.C. 2317. The judgment has no application to the facts of the present case.

6. In *M/s.Sunil Enterprises*, the Appellants / Respondents before the Supreme Court had filed the suit against the Defendant/Appellant. One M/s.Khanna Sales Corporation were the drawees of the bills of exchange who had availed of a bill discounting facility with the Respondents. The Respondents accordingly made payment to M/s.Khanna Sales Corporation in respect of the bills that were discounted. As the amounts under the bills of exchange were not paid the Respondents filed the suit. It was contended on behalf of the Appellant that the bills of exchange were executed without consideration as the goods were neither sold nor supplied in the transaction in question. What is important to note however is the fact that the Appellants had alleged fraud, collusion and connivance between the officers of the Respondent and M/s.Khanna Sales Corporation. It is further important to note as recorded in the judgment that in identical matters involving the Appellants leave to defend had been granted by the High Court. The Supreme Court held as follows :-

> "5. In those cases the circumstances arising are that the Bills of Exchange were accepted by the defendants even though they had already discharged earlier Bills of Exchange as and when they were due and the bank had continued to pay out such large amounts of Bills of Exchange accepted by the party who is already a defaulter. It is also contended that some of the Bills of Exchange were mere secondary documents and therefore, these matters require examination. It cannot be said that the defence raised by the appellants is totally defenceless or moonshine or illusory as noticed earlier in the course of this order. Therefore, the view taken by the High Court that appellants have absolutely no prima facie case may not be correct".

7. It is clear therefore that in *M/s.Sunil Enterprises* the Supreme Court considered the conduct of the Respondent Bank in continuing to pay out large amounts in respect of the bills of exchange accepted by the party who was already a defaulter. The Supreme Court held inter-alia that the defence based on these facts could not be stated to be moonshine or illusory. The other factor was a contention on behalf of the Appellants that the said bills of exchange was secondary documents and therefore, required examination.

. We do not read the judgment in *M/s.Sunil Enterprises* as having held that merely because it is

alleged by the acceptor that there was a failure of consideration in the transaction between the drawer and himself, the same would furnish a defence to his liability as an acceptor. In that case the holder of the bill of exchange was alleged to have colluded with the other parties to the bill of exchange to the prejudice of the acceptor qua the payee/the holder of the bill of exchange. No such facts are alleged in the case before us. There is nothing in the present case to suggest that there was any failure of consideration.

. In the circumstances, the Appeal is dismissed.

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DATE OF DECISION : 16TH MARCH, 2005

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH

H**ON'BLE MR.JUSTICE S.J. VAZIFDAR**.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)